Supreme Court, U.S.
FILED
JUN 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1603

In the Supreme Court of the United States

OCTOBER TERM, 1986

BRAJ NANDAN SINGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether crates of narcotics seized from the open doorway of a storehouse following a controlled delivery should have been suppressed.

2. Whether the district court erred in refusing to permit petitioner to introduce the testimony of two witnesses until a proper foundation was laid.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Brooks v. *Tennessee*, 406 U.S. 605 (1972)	15, 16
Chapman v. *California*, 386 U.S. 18 (1967)	13
Geders v. *United States*, 425 U.S. 80 (1976)	8
Illinois v. *Andreas*, 463 U.S. 765 (1983)	10
Katz v. *United States*, 389 U.S. 347 (1967)	10-11
Nix v. *Williams*, 467 U.S. 431 (1984)	12
Powell v. *Alabama*, 287 U.S. 45 (1932)	15
Texas v. *Brown*, 460 U.S. 730 (1983)	10
United States v. *Crews*, 445 U.S. 463 (1980)	12
United States v. *Cronic*, 466 U.S. 648 (1984)	16
United States v. *Hasting*, 461 U.S. 499 (1983)	16
United States v. *Knotts*, 460 U.S. 276 (1983)	10
United States v. *Leon*, 679 F.2d 534 (5th Cir. 1982)	15
United States v. *Santana*, 427 U.S. 38 (1976)	10

Constitution and statutes:

U.S. Const. Amend. IV	6, 7, 9, 10, 11, 12, 13
21 U.S.C. 841(a)	2
21 U.S.C. 846	2
21 U.S.C. 952(a)	2

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1603

BRAJ NANDAN SINGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 811 F.2d 758. The memorandum and order of the district court (Pet. App. 25-34) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1987. The petition for a writ of certiorari was filed on April 3, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of importing heroin and hashish, in violation of 21 U.S.C. 952(a); possession of heroin and hashish with intent to distribute them, in violation of 21 U.S.C. 841(a); and conspiracy to distribute controlled substances, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of ten years' imprisonment on each count, to be followed by a ten-year term of special parole. The court of appeals affirmed (Pet. App. 1-24).

1. The evidence before the district court, which is summarized in the opinions of the district court and the court of appeals, showed that on June 4, 1985, Customs Service inspectors at Port Newark, New Jersey, searched a 20-foot shipping container that had arrived by sea from India. The container was consigned to petitioner's company, Little India of Queens, New York. The shipping documents stated that the container held 258 packages of Indian foodstuffs. A Customs inspector at the port of entry opened the container and found burlap bags and crates wrapped in burlap. When the inspector opened one of the crates, he found that it was filled with hashish. Pet. App. 2, 26.

The Customs inspectors, acting in concert with DEA agents, decided to make a controlled delivery of the container. They repacked the crate that had been opened, placed it back inside the container, and resealed the container. DEA agents then maintained close surveillance as an employee of a trucking company picked up the container and took it to a terminal in Secaucus, New Jersey. The following day, pe-

titioner called the trucking company and requested that the cargo be delivered that evening either to his store or to his storeroom in Queens, New York. Petitioner agreed to pay the additional costs of the nighttime delivery. Pet. App. 27.

When the shipping container was delivered, it was left on the street opposite petitioner's storeroom. Petitioner and four companions then began unloading crates from the container and moving the crates into the storeroom. Petitioner told a local police officer who was investigating a reported burglary in the neighborhood that he was the owner of the crates that were being unloaded. While the crates and packages were being unloaded from the shipping container, the doors to the storeroom remained open, giving the agents an unobstructed view of the small street-level storeroom.[1] The agents could see that the crates were being placed just inside the doors of the storeroom; the packages were visible to the agents throughout the unloading process and after they had come to rest in the storeroom. In the course of the unloading process, the men who were unloading the packages placed some of the packages into petitioner's van, which was parked outside the storeroom. After most of the cargo had been unloaded from the shipping container, the agents arrested petitioner. Pet. App. 3, 27-28.

At the time of petitioner's arrest, 40 wooden crates remained in the container. Those crates were searched. Thirty-nine of the crates were found to contain hashish, and the remaining one was found to contain heroin. In addition, nine of the unloaded

---

[1] The evidence showed that the storeroom was only about 600 square feet in area (Pet. App. 3).

crates had been transferred at that point from the container to petitioner's van. The agents searched one of the nine crates and found that it contained hashish. While examining the crates, the agents discovered that the ones containing narcotics had metal bands around them. Pet. App. 3-4, 29.

The agents then examined a number of the metal-banded crates that had been moved from the container to the area right at the doorway of the storeroom. They found that 75 of those crates contained hashish. The crates containing contraband were then put back into the shipping container outside the storeroom for later removal. The agents subsequently obtained search warrants authorizing the search of the storeroom, petitioner's residence, and his store. Pet. App. 4, 29-30.

Petitioner testified in his own behalf at trial. He admitted that he had ordered and accepted delivery of the shipping container, but he claimed that he had only ordered foodstuffs and was unaware that there were drugs inside the container. Petitioner explained that during the unloading process he placed the damaged packages in his van so that he could take those packages to his retail store for quick sale. C.A. App. 496-500, 522-523.

Petitioner also testified that following his arrest he received an unsolicited visit from attorney Robert Nerboso at the Metropolitan Correctional Center (MCC). According to petitioner, Nerboso said that one of petitioner's friends in Amsterdam had sent him to represent petitioner. Petitioner testified that Nerboso made a second unsolicited visit to him at the MCC in late June. During that visit petitioner told Nerboso to talk to petitioner's lawyer. C.A. App. 510-514.

Nerboso testified that he is an attorney experienced in narcotics cases. He claimed that he was contacted by a person who did not identify himself, and that the unidentified person offered to arrange for the payment of Nerboso's legal fees if petitioner agreed to Nerboso's representation. Nerboso denied that he had told petitioner that the unidentified person was from Amsterdam. Nerboso said that he visited petitioner at the MCC because "[i]t was a big case, potentially it was worth the trip for me" (C.A. App. 566-569).

At the district court's request, the government stipulated that a "representative" of petitioner had informed the government of Nerboso's visits to the MCC. The government also stipulated that this "representative" had told the government that petitioner had prior business dealings with two exporters from India, including the exporter who allegedly sent petitioner the 20-foot container. This stipulation obviated the need for petitioner to call a government agent to confirm that defense counsel had contacted the government to relay this information from petitioner. It also obviated the need to call defense counsel—petitioner's "representative"—as a witness. C.A. App. 518.

On rebuttal, petitioner's associate Pramesthi Jain testified that he had obtained heroin from petitioner on numerous occasions in 1984 and 1985. He further testified that he was expecting to obtain five kilograms of heroin from petitioner in May 1985, but that the transaction failed when petitioner was arrested and the narcotics were seized. C.A. App. 605-625.

2. The district court denied petitioner's motion to suppress the evidence that was seized from the ship-

ping container. The court noted that the container had already been searched by Customs agents as part of a border search and that it therefore did not violate petitioner's Fourth Amendment rights for the agents to open the crates that were in petitioner's van and the crates that were still in the container at the time of petitioner's arrest. Pet. App. 31. With respect to the crates that were found in the storeroom, the district court commented that the agents' warrantless entry into the warehouse to seize the crates "appears to have been illegal" (Pet. App. 32). The court, however, declined to suppress the contraband that was found in those crates. The court reasoned that the packages were not obtained "as a result of this illegality," because "[t]he container in its entirety had already been seized, and its contents would inevitably have had to be inventoried and inspected before its release to anyone" (*ibid.*). Therefore, the court concluded, "[w]hether simply as a matter of causation or application of the inevitable discovery rule, no suppression is required in the circumstances here presented by reason of the agents' wrongful entry into the warehouse" (*ibid.*).

The district court also denied petitioner's request to permit Robert Nerboso and a government agent to testify before petitioner testified. Defense counsel represented that Nerboso would testify that an unidentified third party had sent him to the MCC to represent petitioner. Counsel represented that the government agent would testify that defense counsel had told him both about Nerboso and about petitioner's past dealings with the two Indian exporters. The government objected to the proposed testimony on grounds of hearsay and relevance. C.A. App. 426-

433. The court, questioning the admissibility of the proposed testimony, stated (C.A. App. 432-433):

> I better hear [petitioner's] testimony first. Then maybe if it's appropriate we'll put on some evidence after that as to the statements. I'll hear it then. It * * * sounds to me like you are going far beyond what might be permissible, simply making yoursel[ves] witnesses and having [the government agent] testify as to what you would say if you were called to the stand [on] behalf of your client which is a very unusual proceeding.
>
> * * * * *
>
> I'll take it up after the defendant has testified, when I'll be in a better position to see what first-hand information there is.

3. The court of appeals affirmed petitioner's convictions by a divided vote. The court held that the crates were lawfully seized by the Customs inspectors when the inspectors first opened the shipping container and discovered hashish at the port of entry. Thereafter, the court ruled, the government retained constructive possession of the contraband during the controlled delivery (Pet. App. 5). The court held that the "retaking of contraband located just inside the open storeroom doors, under direct government surveillance and constructively in the government's possession" did not offend the Fourth Amendment (Pet. App. 6).

The court of appeals noted that in view of the minimal nature of the agents' intrusion into the storeroom and the need for continued surveillance of the crate as part of the "controlled delivery," the entry into the storeroom might have been justified

on grounds of exigency. Without resolving that question, however, the court concluded that the government was correct in its contention that, under the circumstances of this case, the agents' "retaking of the warehoused narcotics yielded nothing of evidentiary value that was not already in [the government's] possession" (Pet. App. 6-7). In any event, the court held, even if the admission of the crates taken from the storeroom was error, the error was harmless. The court observed that the government could see how many of the metal-banded crates were in the storeroom without entering the storeroom at all. The government had seized similar banded crates outside the storeroom from the shipping container and the van; those crates contained hashish having a wholesale value of more than $4 million and heroin with a street value of $10 to 12 million. Therefore, "[a] reasonable jury undoubtedly would correctly conclude that the contents of the packages removed to the storeroom would be as incriminating as the contents of those that were outside the building" (Pet. App. 7). The court thus held that it "is simply inconceivable that the jury in this case, or any other jury in similar circumstances, would have acquitted" (*ibid.*), even if the evidence found in the storeroom had been suppressed.

The court also rejected petitioner's claim that the district court deprived him of due process by requiring that he lay a foundation for the introduction of the testimony of Robert Nerboso by testifying before Nerboso. The court found that the district court had not compelled petitioner "to testify at all. It merely refused to accept the proffered testimony of other witnesses until a proper foundation was laid." Pet. App. 8. Quoting *Geders* v. *United States*, 425 U.S. 80, 86 (1976), the court of appeals noted that it is

ordinarily within the discretion of the district court to determine the order in which parties will adduce their proof, and that the district court had not abused that discretion in this case (Pet. App. 9).

Judge Kearse dissented on the Fourth Amendment question. She concluded that the warrantless entry into the storeroom to retrieve the unloaded crates was unlawful. First, she disagreed with the factual premise of the majority's opinion, namely, that the crates were "right at the doorway" of the storeroom. She conceded that the majority's view was supported by the evidence before the district court, but she noted that on the basis of the search warrant affidavits, the district court had found that "[t]he warehouse appeared filled with crates and sacks of which a majority were from the container." Pet. App. 11. Judge Kearse also disagreed with the majority that the agents retained constructive possession of the crates after petitioner had placed them inside the storeroom (Pet. App. 14-15). Even if the agents were required to make only a minimal intrusion into the storeroom to retrieve the crates, Judge Kearse concluded, that intrusion required a warrant (Pet. App. 13-14).

Finding a constitutional violation, Judge Kearse determined that the crates should have been suppressed because, in her view, no exception to the exclusionary rule was applicable to the seizures inside the storeroom (Pet. App. 18-23). She also disagreed with the majority that the introduction of the evidence from the storeroom was harmless under the circumstances of this case (Pet. App. 23-24).

ARGUMENT

1. Petitioner contends (Pet. 11-17) that the crates of contraband that had been placed just inside the open doorway of the storeroom should have been suppressed because the agents entered the storeroom to retrieve the crates without a warrant.

Petitioner does not dispute that the seizure of the crates was supported by probable cause. Nor does he dispute that the agents could have seized the crates without a warrant before they were placed inside the storeroom, and that based on their prior lawful search of the shipping container, the agents could have removed the narcotics from the crates at that time, also without a warrant. See *Illinois* v. *Andreas*, 463 U.S. 765 (1983). Petitioner also does not dispute that throughout the unloading process the crates were plainly visible to persons outside the storeroom looking through the open storeroom doors. And the evidence introduced in the district court made it clear that petitioner had knowingly exposed the interior of the storeroom to public view. Under these circumstances, we submit that the court of appeals was correct in concluding that the government did not forfeit its right to effect a warrantless seizure of the crates by waiting until petitioner and his companions had placed the crates just beyond the threshold of the open doors. Cf. *United States* v. *Santana*, 427 U.S. 38, 42-43 (1976).

It is well settled that the Fourth Amendment protects only legitimate expectations of privacy. *Texas* v. *Brown*, 460 U.S. 730, 740 (1983). And it is equally well settled that one does not have a legitimate expectation of privacy in that which he knowingly exposes to public view. *United States* v. *Knotts*, 460 U.S. 276, 280-285 (1983); *Katz* v. *United States*,

389 U.S. 347, 351 (1967). In this case, as the court of appeals observed, the open doors of the small storeroom were wide enough to permit 10 men to stand shoulder to shoulder. From the sidewalk, any passerby could look into the storeroom and obtain a clear view of the location where the crates had been placed. By stepping over the threshold to retrieve the crates that had been placed "right in the door," the agents may have entered an area from which petitioner had the legal right to exclude the public, but they did not enter an area that petitioner had sought to protect from public view.

Although petitioner treats the court of appeals' decision in this case as if it gave broad approval to warrantless entries into private premises, the court's approach was in fact carefully limited to the unusual facts before it. In holding that the Fourth Amendment was not violated under the circumstances of this case, the court of appeals relied heavily on the following facts peculiar to this case: (1) the crates of contraband were in the constructive possession of the agents throughout the process of the "controlled delivery"; (2) the crates that were inside the confines of the storeroom were in view of the agents at all times; (3) the storeroom was open to view from outside through a wide doorway that remained open throughout the period that the unloading was being conducted; (4) only a minimal intrusion into the storeroom was necessary for the agents to retrieve the metal-banded crates, which had been placed right in the open doorway of the storeroom; and (5) the agents did not seize any evidence during the time they were in the storeroom that they had not seen from outside. Because of the combination of the agents' effective control over the contents of the

shipping container and petitioner's lack of any apparent effort to ensure the privacy of the proceedings in the storeroom, the court of appeals was correct in concluding that the agents' minimal intrusion into the storeroom to retrieve the crates did not violate the Fourth Amendment.

The court of appeals also concluded—correctly, we believe—that even if the agents conducted a "search" for Fourth Amendment purposes by entering the storeroom, the government's ultimate success in obtaining the contraband in the crates was not the "fruit" of that search. The agents knew, without having to examine the crates inside the storeroom, that many of those crates contained contraband (see Pet. App. 7). Because the crates were lawfully "seized" throughout the period of the controlled delivery, the agents could lawfully have recovered the crates at any time before the crates entered the storeroom. And because the agents did not obtain any evidence inside the storeroom that they had not already "seized" as part of the controlled delivery, the entry into the storeroom was not the cause of the government's obtaining evidence that it would not otherwise have had. Cf. *United States* v. *Crews*, 445 U.S. 463 (1980). Accordingly, since the contraband offered at trial was not obtained as a result of the exploitation of a Fourth Amendment violation, the court of appeals was correct in concluding that the evidence did not have to be suppressed.

The district court correctly noted that the same result would follow from the application of the inevitable discovery rule. See *Nix* v. *Williams*, 467 U.S. 431 (1984). As the district court found, "[t]he container in its entirety had already been seized, and its contents would inevitably have had to be inventoried

and inspected before its release to anyone" (Pet. App. 32). There was no possibility that petitioner or anyone else would be permitted to leave the storeroom with the crates that had been unloaded from the container. Whether as a result of the subsequent warrant-authorized search, or whether as a result of the seizure that would have occurred if petitioner had sought to move the crates or their contents from the storeroom, the agents would inevitably have obtained lawful custody of the narcotics. Under the inevitable discovery doctrine, as the district court held, suppression of the contents of the crates would therefore not have been appropriate.

In any event, there is no reason for this Court to review the question whether the agents violated the Fourth Amendment by stepping over the threshold to seize the crates and, if so, whether the violation should result in suppression of the evidence. As the court of appeals found, the introduction into evidence of the "storeroom" crates, even if erroneous, was harmless beyond a reasonable doubt. See *Chapman* v. *California*, 386 U.S. 18, 22 (1967).

The case against petitioner was overwhelming. Petitioner was caught red-handed with the shipping container, and he admitted to a passing police officer that the cargo belonged to him. Substantial quantities of hashish and heroin were found in the crates that had not yet been unloaded from the shipping container as well as in one crate that had been placed in petitioner's van.[2] Without introducing any of the

---

[2] Even the dissenting judge in the court of appeals acknowledged that it could well be that "since the evidence against [petitioner] included a ton of hashish and 20 pounds of heroin found in crates that remained outside the warehouse, the jury would have convicted [petitioner] even if the evidence seized from the warehouse had been suppressed" (Pet. App. 23).

physical evidence seized from the storeroom, the agents still could have testified that they saw petitioner and his crew unload identical crates from the container into the storeroom. The jury would have been entitled to infer that these crates also contained narcotics. Moreover, petitioner's denial that he knew the nature of the cargo was forcefully rebutted by the government's rebuttal witness, who had purchased heroin from petitioner on several occasions and was waiting for the delivery of some of the heroin from the seized container. In this case, therefore, the court of appeals was correct in concluding that there is no likelihood that the jury's verdict turned on the introduction into evidence of the crates from the storeroom.[3]

---

[3] Petitioner notes (Pet. 15-17) that the prosecutor referred to the drugs found in the storeroom in the course of closing argument and that the evidence seized from the storeroom was highly prejudicial to him. The prosecutor, however, merely invited the jury to conclude that the fact that petitioner was unloading the narcotics into his storeroom was evidence that he intentionally possessed the drugs. That inference did not depend on the fact that the crates in the storeroom were found to contain narcotics; the inference would have been equally strong if based only on evidence seized outside the storeroom. In that event, the evidence still would have shown that petitioner was unloading the crates from the container and putting them into his storeroom, and that the metal-banded crates remaining in the container at the time of petitioner's arrest all held narcotics. In addition, the evidence would have shown that one of the crates containing narcotics had been placed directly into petitioner's van. Under those circumstances, the inference that petitioner was moving narcotics from the container into his storeroom, and that he was therefore highly likely to be aware of their contents, would have been equally available regardless of whether the government had been able to introduce evidence regarding

2. The court of appeals correctly rejected petitioner's claim that he had a right to insist that Robert Nerboso testify before petitioner took the stand. Contrary to petitioner's claim (Pet. 19), a defendant does not have an unqualified "constitutional right to time his testimony." *United States* v. *Leon*, 679 F.2d 534, 538 (5th Cir. 1982) (no constitutional violation where the defendant is ordered to proceed with his testimony where another defense witness is not yet available). *Brooks* v. *Tennessee*, 406 U.S. 605 (1972), on which petitioner relies, struck down a statute requiring that the defendant *always* testify before any other defense witness. 406 U.S. at 607-612. The Court reasoned that the Tennessee statute burdened the defendant's right to remain silent at trial by forcing him to testify at the close of the government's case, or never. In this case, however, petitioner always intended to take the stand, and he does not claim that the district court's ruling forced him to forfeit his right to remain silent. The district court's order merely affected the timing of the evidence offered in the defense case.

Furthermore, the district court was not interfering with the " 'guiding hand of counsel' " (see *Brooks*, 406 U.S. at 612-613, quoting *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932)) by predicating the admissibility of Nerboso's testimony and the proffered testimony of the government agent on the foundation that petitioner laid through his testimony. The district court was not interfering with petitioner's trial strategy; it was rendering an evidentiary ruling. The proffered testimony of Nerboso and the agent was un-

---

the contents of the crates that had already been placed in the storeroom at the time of petitioner's arrest.

deniably hearsay; accordingly, the district court had substantial doubts about its admissibility. Thus, the district court acted well within its discretion in requiring that petitioner show the need for this evidence by testifying first.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

JUNE 1987

---

[4] Significantly, petitioner does not and cannot show that he was prejudiced in any manner by testifying before Nerboso. Consequently, even if his right to due process has somehow been infringed, he is not entitled to reversal of his conviction. See *United States* v. *Hasting*, 461 U.S. 499 (1983). *United States* v. *Cronic*, 466 U.S. 648 (1984), does not hold that it is always per se reversible error for a trial judge to order a defendant to testify before another witness. In *Cronic*, the Court simply noted that the defendant in *Brooks* v. *Tennessee* did not have to show prejudice because the Tennessee statute, which compelled the defendant to testify first in all situations, prevented defense counsel "from assisting the accused during a critical stage of the proceeding" (*Cronic*, 466 U.S. at 659 n.25). Here, in contrast, the district court's ruling did not interfere with defense counsel's trial strategy in any meaningful way. Thus, petitioner cannot escape from the usual requirement of demonstrating prejudice before being entitled to reversal of his conviction.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40377